Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

STATE OF ILLINOIS, *et al.*,

Petitioners,

v.

MICHAEL J. McDONNELL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that the Constitution did not afford the State of Nevada sovereign immunity from a suit filed in the courts of California. The suit in that case involved an automobile accident. The questions presented by this petition are:

1. Whether, under *Hall*, 440 U.S. at 424 n. 24, a state tax auditor's age discrimination suit, brought against his employing State in the courts of a sister State, "interfere[s] with [the employing State's] capacity to fulfill its own sovereign responsibilities" and therefore poses a "substantial threat to our constitutional system of cooperative federalism."

2. Whether *Hall* should be reexamined in light of the Court's recent reinforcement of sovereign immunities from suit enjoyed by States and its recognition that such immunities can be implied from constitutional structure.

PARTIES

Petitioners are the State of Illinois, the Illinois Department of Revenue, and six officers or employees of that Department: Samuel McGaw, Michael Scaduto, Joe Bartletti, Juan Morales, Frank Nugnes, and Brian McGrail. Respondent is Michael J. McDonnell.

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INTRODUCTION

Petitioners the State of Illinois, its Department of Revenue and various officials of that Department, respectfully ask this Court to issue a writ of certiorari to the Supreme Court of New Jersey to review that court's judgement and opinion entered on March 2, 2000.

OPINIONS BELOW

The initial rulings of the Superior Court of New Jersey were made by letters dated September 19 and October 24, 1997, and were not published; they are reprinted in the Appendix to this Petition (App. 26-30). The decision of the Superior Court, Appellate Division, was issued on March 15, 1999 and is reported at *McDonnell v. State of Illinois*, 319 N.J. Super. 324, 725 A.2d 126 (1999). It is also reprinted in the Appendix to this Petition (App. 9-25). The opinion of the Supreme Court of New Jersey was issued on March 2, 2000, and is reported at *McDonnell v. State of Illinois*, 163 N.J. 298, 748 A.2d 1105 (2000). That opinion is also reprinted in the Appendix to this Petition (App. 1-8).

JURISDICTION

The Supreme Court of New Jersey entered its judgement on March 2, 2000. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(a), because Petitioners claim immunity from suit under the United States Constitution.

STATEMENT OF THE CASE

Respondent Michael J. McDonnell, a resident of New Jersey, was hired by the Illinois Department of Revenue (hereinafter "the Department") in 1988 to serve in the Department's field office in Paramus, New Jersey. (Like a number of other States, Illinois maintains revenue field offices in other regions of the country to facilitate the collection of appropriate Illinois state taxes from individuals and businesses located outside the State.) Respondent was hired as a trainee but was promoted to auditor after about a year on the job. During the course of his work at the Department, Respondent developed a history of unsatisfactory work performance. In particular, in early 1993 he was suspended for permitting a statute of limitations to lapse, and later that year it was discovered that he had failed for almost two months to turn in several checks that had been tendered to him in payment of tax obligations. After a full review by Respondent's supervisors in Paramus, the decision to fire Respondent was made by officials at the Department's central office in Springfield, Illinois. Respondent was fired in August 1993. App. 11-12.

Following his termination, Respondent sought and obtained unemployment benefits from the Illinois Department of Employment Security. He filed no action in Illinois challenging his termination. Instead, in July 1995 Respondent filed a suit in the Superior Court of New Jersey, Bergen County Law Division. Named as defendants were the State of Illinois, the Department, and officers and supervisory employees of the Department located in Springfield and in Paramus. The complaint alleged that Respondent's termination was based on his

age and therefore violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq*. It also included counts charging infliction of emotional distress, negligent termination and a violation of the Employee Retirement Income Security Act, 29 U.S.C. §1140 *et seq*.

Petitioners moved to dismiss on various grounds, including sovereign immunity. The Superior Court initially denied Petitioners' motion in a letter ruling, App. 29-30, but reconsidered just over a month later and in another letter ruling dismissed the case, App. 26-28. The court held, in part, that the State of Illinois, the Department and its officials could not be sued in New Jersey's courts because such a suit "would clearly offend the sovereign responsibilities of Illinois." App. 27. The court distinguished this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), noting that a suit involving a State's employment relationship with an employee was more likely to interfere with Illinois' capacity to "fulfill its sovereign responsibilities" than one involving a car accident, as in *Hall*. App. 27, *citing Hall*, 440 U.S. at 424.

Respondent appealed the dismissal of his suit to the Appellate Division of the Superior Court of New Jersey. That court reversed on March 15, 1999. App. 9-25. Citing *Hall*, the court held that the Constitution did not afford Illinois sovereign immunity from suit in New Jersey's courts, App. 14-15. The court did not address the distinction drawn by the trial court between a suit over termination of employment and one involving a car accident. The court went on to consider whether it would decline jurisdiction under the doctrine of comity. In deciding not to do so, the court noted that both Illinois and New Jersey, through their legislatures, had expressed strong

policies against age discrimination, including discrimination by the State as an employer: New Jersey by the enactment of its Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, and Illinois by the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* The court held, however, that as an employee living and working in New Jersey, Respondent could not have challenged his firing under the Illinois statute but could do so under New Jersey's law. App. 16-20. The court concluded that declining jurisdiction in New Jersey would thus leave Respondent without a remedy. App. 20.

Petitioners sought and obtained leave to appeal to the Supreme Court of New Jersey. That court affirmed the Appellate Division's decision on March 2, 2000. App. 1-8. The court held that only the doctrine of comity, as opposed to sovereign immunity, could protect Illinois from suit in New Jersey courts. App. 2-4. Although the court did not specifically address the trial court's distinction between *Hall* and the instant employment discrimination case, the court did later observe, in addressing comity, that it perceived no "disruption" of Illinois' state governmental function (*i.e.*, tax collection) in permitting Respondent to challenge his firing in New Jersey's courts so long as Illinois collected taxes "without discriminating against employees who live in New Jersey in violation of [New Jersey law]." App. 7. (Nonetheless, the court barred reinstatement as a remedy for Respondent, finding that such an order "might constitute an affront to Illinois' sovereignty." App. 8.) The court disagreed with the Appellate Division in accepting Petitioner's contention that Respondent could, in fact, have challenged his termination in Illinois under the Illinois Human Rights Act, App.

3-4, but still declined to apply principles of comity because Respondent would now be barred from mounting such a challenge by Illinois' requirement that such challenges be filed within 180 days of the discovery of the discriminatory injury. App. 4; 775 ILCS 5/7A-102(A)(1).

Petitioners now seek a writ of certiorari from this Court to review the decision of the Supreme Court of New Jersey.

REASONS FOR GRANTING THE WRIT

1. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER ALLOWING ILLINOIS TO BE SUED IN THE COURTS OF NEW JERSEY OVER ILLINOIS' FIRING OF A STATE TAX AUDITOR WOULD INTERFERE WITH ILLINOIS' ABILITY TO FULFILL THE "SOVEREIGN RESPONSIBILITIES" OF THE EMPLOYMENT OF STATE AGENTS AND THE COLLECTION OF TAXES.

In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that the United States Constitution did not provide States with immunity from suit in the courts of a sister State in connection with a lawsuit founded on an automobile accident. Although the Court spoke in general terms in concluding that the Constitution afforded Nevada no sovereign immunity from suit in California, it did indicate that this principle had limitations, and that those limitations were related to the important concept of the ability of States to fulfill their "sovereign responsibilities," *id.* at 410 n. 24. This case presents the Court with an opportunity to clarify those critical limitations.

Hall concerned a car accident that occurred in California, the forum State, and involved a vehicle owned and

driven by an employee of the State of Nevada. 440 U.S. at 411-12. A majority of the Court, reviewing both the text of the Constitution and writings related to its drafting and ratification, observed that the Constitution contained no express limitation on suits against States in the courts of other States. Although the majority conceded that the Framers were likely subject to the "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent," *id.* at 420, it concluded that the attention of the drafters had instead been occupied by concerns with state immunity from suits in the newly-created federal courts, *id.* at 418-20.

Dissenting Justices recognized the absence of an explicit textual bar on suits against States in sister States' courts, but argued that the concept of state sovereignty, as contemplated by the framers and by the law of sovereign immunity as it had developed at that time, suggested that such a limitation was implicit. Justice Blackmun believed that the drafters of the Constitution had not mentioned state-to-state immunity because "it was too obvious to deserve mention," 440 U.S. at 431, and contended that "the source [of such immunity was] not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism." *Id.* at 430. Then-Associate Justice Rehnquist agreed, arguing against the "literalism" of the majority and in favor of constitutional protection for States from suit in a sister State's courts as necessary for the effective operation of the "constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." *Id.* at 433.

Although it accorded no immunity to Nevada, the *Hall* majority did recognize that its holding could well be confined to similar factual contexts. The majority spoke with little qualification ("paint[ed] with a very broad brush," as Justice Blackmun wrote in dissent, 440 U.S. at 427), but did recognize that disputes more substantive than those involving automobile accidents could raise more serious concerns regarding the constitutional relationship among States:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or Nevada, might require a different analysis or a different result.

Id. at 424 n. 24. The majority thus recognized that subjecting a sovereign State to the entry of judgement by the courts of an equal with respect to a matter more closely tied to the function of that State's government would carry greater constitutional implications and could alter not only the result, but also the "analysis" of whether the Constitution affords protection to States from such interference.

The instant case presents the very "occasion" posited in *Hall*. Respondent's lawsuit against Illinois and its officers, if permitted to continue, will place important state government concerns of Illinois under the review of New Jersey's courts. Unlike the traffic accident in *Hall*, Respondent's firing by an Illinois government agency im-

plicates two distinct subjects related to Illinois' ability to "fulfill its own sovereign responsibilities." First, the suit would examine Illinois' employment relationship with Respondent, and require Illinois to defend its decision to terminate that relationship.[1] The hiring and firing of its agents represents the discharge of one of a State's core "sovereign responsibilities." Second, Respondent's suit would implicate Illinois' decision regarding who may act as an agent of the State in the collection of tax revenues. As an auditor, Respondent was responsible for acquiring and evaluating information relevant to amounts of tax owed to Illinois and was authorized to collect tax payments on behalf of the State. The assessment and collection of tax revenues is an obvious and integral state function, one that is both essential to a State's operation and unique to its status as a sovereign entity. By contrast, the automobile accident case at issue in *Hall* presented Nevada in a role common to individuals, *i.e.* that of the driver of a car, and did not implicate any significant state policies.

The concerns Illinois faces as a result of Respondent's suit against it in a sister State's courts are categorically weightier than those presented by the traffic accident

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[1] That the Supreme Court of New Jersey ruled out reinstatement for Respondent as a discretionary extension of comity (App. 4-7) does not significantly reduce Illinois' concern about defending its official decisions in New Jersey's courts. The court did not do so as a matter of law, and comity provides no firm protection against the entry of an order in a sister State's court. In addition, in the instant case Illinois still faces the threat of financial penalties based on those decisions imposed by a co-equal sovereign.

suit in *Hall*. Those concerns test the limitations *Hall* itself placed on the holding that a State is afforded no immunity by the Constitution from suit in the courts of another State. This Court should grant review of the decision of the Supreme Court of New Jersey to clarify the extent to which a suit that implicates different and more important "state policies" represents a greater threat to cooperative federalism and so commands a different constitutional analysis of interstate relationships.

2. REVIEW SHOULD BE GRANTED TO PERMIT THE COURT TO REEXAMINE *NEVADA v. HALL* IN LIGHT OF ITS RECENT RECOGNITION THAT SOVEREIGN IMMUNITY MAY BE IMPLIED FROM THE STRUCTURE OF THE CONSTITUTION.

Twenty-one years ago, the Court examined the text of the Constitution and, finding in it no express limitation on suits against States in the courts of sister States, also declined to find such a limitation to be implied. *Nevada v. Hall*, 440 U.S. 410, 424-26 (1979). Dissenting Justices argued that immunity from such suits in the courts of co-equal sovereigns was a necessary, if implied, component of "the constitutional plan," 440 U.S. at 441 (Rehnquist, J., dissenting); *see also* 440 U.S. at 430 (Blackmun, J. dissenting) (immunity from suits in another State's courts "a guarantee that is implied as an essential component of federalism.").

The law of sovereign immunity has undergone substantial review since *Hall* was decided, and particularly within the last several years. Although recent opinions have focused on state immunity from suits in the federal

courts, their holdings, as well as their reinforcement of the rights of sovereign States to be protected from suit without consent, show that a reassessment of the *Hall* majority's unwillingness to read a limitation on sister-State suits into the constitutional model is in order. Indeed, this case perfectly presents the anomaly created by failing to extend constitutionally-based sovereign immunity to States as defendants in other States' courts. Respondent could have raised his age discrimination claim against Illinois in an Illinois forum,[2] but only because Illinois has so consented, *see* 775 ILCS 5/1-101 *et seq*. Similarly, absent such consent he could not have sued Illinois in federal court under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq*. *Kimel v. Florida Board of Regents*, ___ U.S. ___, 120 S.Ct. 631 (2000). Despite these protections against suit in its own or federal courts, though, Respondent has been allowed to maintain his suit, over Illinois' objections, in the courts of New Jersey. That a State should be less protected in the courts of a peer than in those of a higher (federal) sovereign or in its own courts cannot be reconciled with the Constitution's plan of a union of equal sovereigns.

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[2] Under the Illinois Human Rights Act, a charge of employment discrimination is not heard originally in court. It is initially filed with the Illinois Department of Human Rights, which conducts a full investigation. If the charge is sustained the Department files a complaint with the Illinois Human Rights Commission, which then hears the case. If the charge is dismissed by the Department the complainant may file his or her own complaint with the Commission. 775 ILCS 5/7A-102, 5/8A-102-03. Review of the Commission's decisions may be sought in the Illinois Appellate Court. 775 ILCS 5/8-111.

The *Hall* majority began its analysis by acknowledging that the concept of sovereign immunity substantially predated the Constitution, 440 U.S. at 414-15, and was "a matter of importance in the early days of independence," *id.* at 418 (footnote omitted). The Court observed that immunity from suit in one's own courts was absolute, but that similar protection from suit in the courts of another sovereign depended on "an agreement, express or implied, between the two sovereigns." *Id.* at 416.[3] The Court found no such express agreement among the States in the Constitution and declined to find that one was implied. The Court noted that immunity from suit in the courts of a sister State was not discussed in constitutional debates, and reasoned from this silence that the issue "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-19.

The *Hall* Court's analysis is inconsistent with current methods of interpreting silence on the part of the Framers on an issue of immunity. This Court addressed the implications of constitutional silence for constitutional structure in *Alden v. Maine*, 527 U.S. 706 (1999). Although that case concerned Congress' ability to subject States to suits in their own courts, the Court did apply an analysis similar to that of *Hall*, but with much different results. In considering whether Congress had the authority to abrogate the immunity of States to suit in their own courts, the *Alden* Court, as had the Court in

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[3] The Court added that protection from suit could also be voluntarily extended by the forum State through application of the discretionary doctrine of comity. 440 U.S. at 416.

Hall, looked first to the debates leading to the ratification of the Constitution. As in *Hall*, the *Alden* Court found no express guidance in those proceedings: "the historical record gives no instruction as to the founding generation's intent to preserve the States' immunity from suit in their own courts." *Id.* at 741.

The *Alden* Court's inference from that silence, however, stands in marked contrast to that drawn in *Hall*. Whereas in *Hall* the Court had read silence to demonstrate a lack of concern on the part of the Framers, 440 U.S. at 419, *Alden* drew the opposite conclusion:

> We believe, however, that the founders' intent is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was *a principle so well established that no one conceived it would be altered by the new Constitution*.

527 U.S. at 741 (emphasis added);[4] *see also Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) ("The only reason why this immunity did not receive specific mention is

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[4] Indeed, the *Hall* Court had itself also noted that concern over Revolutionary War debts on the part of States underlay the Framers' concerns regarding sovereign immunity, 440 U.S. at 418, yet found their silence on the issue of immunity among States to demonstrate lack of interest.

that it was too obvious to deserve mention."). The *Alden* Court ultimately concluded that, even in instances not covered by the text of the Eleventh Amendment, "sovereign immunity derives . . . from the structure of the original Constitution itself. . . . [I]t follows that the scope of the States' immunity from suit is demarcated not by the text [of the Eleventh Amendment] alone but by fundamental postulates implicit in the constitutional design." 527 U.S. at 728-29; *see also Hall*, 440 U.S. at 430-31 (Blackmun, J. dissenting) (sovereign immunity "sufficiently fundamental to our federal structure to have implicit constitutional dimension."); 440 U.S. at 433-36 (Rehnquist, J., dissenting).

This Court has long recognized, as a general matter, that immunity from suit without consent is a well-recognized attribute of the sovereignty of States. *See, e.g., Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890). Although the Court's recent opinions have focused on States' immunity from federal suits, whether in federal courts (as in *Kimel*) or state court (as in *Alden*), the principles underlying sovereign immunity are no less at stake when a suit in the courts of a sister State is at issue. A State has no less need to be "free from judicial compulsion in the carrying out of its policies within the limits of the Constitution," *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 51 (1944), when the entity exercising that compulsion is intended under the Constitution to be an equal; indeed, the offense to the State's sovereignty is greater. The Court should grant review in this case to permit a re-evaluation of its holding in *Hall* in light of its recent acknowledgment of the implicit structural underpinnings of state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of New Jersey should be granted.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-118 September Term 1998

MICHAEL J. MCDONNELL,

Plaintiff-Respondent,

v.

STATE OF ILLINOIS; STATE OF ILLINOIS, DEPARTMENT OF REVENUE; SAMUEL MCGAW; MICHAEL SCADUTO; JOE BARTLETTI; JUAN MORALES; FRANK NUGNES; and BRIAN MCGRAIL,

Defendants-Appellants.

Argued January 19, 2000–Decided March 2, 2000

On certification to the Superior Court, Appellate Division whose opinion is reported at 319 *N.J. Super.* 324 (1999).

Joel D. Bertocchi, Solicitor General of Illinois, a member of the Illinois bar, and *Stephen E. Klausner* argued the cause for appellants (Klausner, Hunter & Rosenberg, attorneys; *Mr. Klausner* and *David L. Rosenberg*, of counsel and on the brief).

Michael J. McDonnell argued the cause *pro se*.

PER CURIAM

We affirm the judgment and disposition of the Appellate Division substantially for the reasons set forth in Judge Braithwaite's thoughtful and comprehensive opinion. *McDonnell v. State of Illinois*, 319 N.J. Super. 324 (App. Div. 1999). We add these further observations, however, in view of the strongly asserted views expressed by the Solicitor General of Illinois, appearing *pro hoc vice* before our Court, that plaintiff's cause of action against the State of Illinois, the Illinois Department of Revenue (IDOR), and individual IDOR employees should be dismissed on comity grounds.

As noted by the Appellate Division opinion, *id.* at 333-35, the United States Supreme Court in *Nevada v. Hall*, 440 U.S. 410, 425-26, 99 S.Ct. 1182, 1191, 59 L.Ed. 2d 416, 425-26 (1979), concluded that although the Eleventh Amendment bars suits in federal courts against a state by citizens of another state, it does not prohibit a state from being sued in another state's courts nor does the full faith and credit clause require the forum State to apply another State's law concerning sovereign immunity if to do so would contravene a significant public policy of the forum State. The Court noted that the question whether one State should defer to the laws of a sister State consistently has been regarded as a matter of State policy, not constitutional mandate:

> The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without

> doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end.
>
> [*Id.* at 426, 99 S. Ct. at 1182, 59 L. Ed. 2d at 428 (quoting *Bank of Augusta v. Earle*, 38 U.S. 519, 590, 13 Pet. 519, 590, 10 L. Ed. 274 (1839).]

Accordingly, the Court in *Hall* encouraged but did not compel states to accord deference to each others' laws as a matter of comity:

> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.
>
> [440 U.S. at 426-427, 99 S. Ct. at 1191, 59 L. Ed. 2d at 429.]

In addressing the comity issue, the Appellate Division concluded that to require plaintiff to pursue his claims in Illinois courts pursuant to the Illinois Human Rights Act (HRA), 775 *Ill. Comp. Stat.* 5/1-101 to 5/10-103 (West 1993) would leave plaintiff remediless because of the definition of "employee" under the HRA applies only to individuals "performing services for remuneration within the State for an employer." 319 N.J. Super. at 335 (internal quotations omitted). Accordingly, the court con-

cluded that the HRA would not afford plaintiff a remedy. *Id.* at 336.

We note, however, that the HRA defines a "Public Employee" as "an employee of the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision." 775 *Ill. Comp. Stat.* 5/2-101(H). We also note that the HRA guarantees and secures several rights enumerated in Article 1, Section 17 of the Illinois Constitution, including the right to be free from discrimination. 775 *Ill. Comp. Stat.* 5/1-102(F). Those provisions of the HRA suggest persuasively that plaintiff could have asserted a cause of action in Illinois under that statute, subject to the limitation that the claim be filed only before the Illinois Human Rights Commission, 775 *Ill. Comp. Stat.* 5/8-111(c), and that monetary damages are limited to actual damages for injury or loss, back pay, and attorneys' fees. 775 *Ill. Comp. Stat.* 5/8A-104(B), (C), (G). Nevertheless, because the HRA requires discrimination claims to be filed with the Illinois Department of Human Rights within 180 days of when a claimant discovers his injury, 775 *Ill. Comp. Stat.* 5/7A-102(A)(1), we also conclude that plaintiff would have no remedy under the HRA because his claim would be time barred.

The Appellate Division rested its determination not to apply comity on the unavailability of redress for plaintiff under the HRA, its conclusion that the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42, applied to the Illinois defendants, the fact that the LAD would apply to the State of New Jersey if it discriminated against a public employee in violation of the statute, and

New Jersey's strong public policy against discrimination in employment. We agree that those reasons argue persuasively against dismissing plaintiff's suit on comity grounds.

We also note that the Appellate Division's rationale is not inconsistent with the Supreme Court of Illinois' pronouncements on the application of comity. In *Schoeberlein v. Purdue University*, 544 N.E. 2d 283 (Ill. 1989), an Illinois resident sued Purdue University (Purdue), an instrumentality of the State of Indiana, in an Illinois state court to recover damages for personal injuries. Under Indiana law plaintiff could have sued Purdue only in Indiana state courts and was subject to a maximum recovery of $300,000. The Illinois Supreme Court noted that if plaintiff sought to assert a claim in Illinois courts against an Illinois state agency, jurisdiction would be limited to the Illinois Court of Claims and recovery would be limited to $100,000. *Id.* at 286. Because it concluded that Indiana's restrictions on its liability were not inconsistent with those of Illinois, the Court dismissed plaintiff's suit on comity grounds.

It observed:

> Thus, the generally accepted rationale of the States that have not, through comity, accepted another State's claim of sovereign immunity is that a sister State's claim of immunity will not be recognized if the forum of litigation permits recovery against the home State under similar circumstances. In Illinois, as noted above, under the circumstances presented in this case, Illinois could not be sued in the circuit courts of this State, and a limitation is placed on the amount that may be recovered against Illinois in the

> Court of Claims. We conclude that on the basis of comity, it is consistent with policies expressed by our Court of Claims Act and not inconsistent with policies in our State constitution to honor Indiana's reservation of sovereign immunity.
>
> [*Id.* at 288.]

Our court's precedents on the applicability of comity focus on an evaluation of the laws and policies of New Jersey and those of the affected state. *City of Philadelphia v. Austin*, 86 N.J. 55, 64 (1981); *Baldwin Enterprises, Inc. v. Town of Warwick, N.Y.*, 226 N.J. Super. 549, 553 (App. Div. 1988). Decisions by other state courts to extend comity to a sister state often reflect a determination that the recognition of the sister state's immunity would not offend the policies of the forum state. *See, e.g.*, *University of Iowa Press v. Urrea*, 440 S.E. 2d 203 (Ga. Ct. App. 1993) (recognizing Iowa's sovereign immunity under Iowa Tort Claims Act as a matter of comity does not offend public policy of Georgia whose Statutes accord comparable immunity to Georgia public entities); *Reed v. University of North Dakota*, 543 N.W. 2d 106 (Minn. Ct. App. 1996) (holding that the recognition of North Dakota's sovereign immunity law would not offend public policies of Minnesota); *Hawsey, III v. Louisiana Dep't of Social Servs.*, 934 S.W. 2d 723 (Tex. App. 1996) (dismissing plaintiff's libel and false imprisonment suit on comity grounds and noting similarity between Texas and Louisiana sovereign immunity provisions); *Jackett v. Los Angeles Dep't of Water & Power*, 771 P.2d 1074 (Utah Ct. App. 1989) (dismissing plaintiff's tort action on comity grounds and emphasizing congruity of Utah and California sovereign immunity statutes).

Courts that have declined to extend comity to sister states have stressed the fact that the forum state's law would not provide its own state with such immunity, or that the forum state's policies would be disserved by a recognition of comity. *See Head v. Platte County, Missouri*, 749 P.2d 6, 10 (Kan. 1988) (declining to extend immunity to Missouri under comity principles because to do so would result in "granting greater immunity to our sister state than the immunity which our citizens through the legislature have bestowed upon our state government"); *Ehrlich-Bober & Co., Inc. v. University of Houston*, 404 N.E.2d 726, 730 (N.Y. 1980) (declining to afford comity based on Texas institution's assertion of sovereign immunity because suit was based on commercial transaction that occurred primarily in New York and New York's "interest naturally embraces a very strong policy of assuring access to a forum for redress of injuries arising out of transactions spawned here"); *Morrison v. Budget Rent A Car Systems, Inc.*, 657 N.Y.S. 2d 721 (N.Y. App. Div. 1997) (declining to apply comity and recognize immunity under South Carolina Tort Claims Act where New York law would not extend immunity to New York in comparable circumstances).

Illinois contends that our refusal to apply comity and dismiss plaintiff's suit against the Illinois defendants would be disruptive to Illinois' revenue collection activity, a basic state governmental function. We perceive no such disruption. Illinois is free to continue to collect tax revenue due to it from New Jersey sources provided it does so without discriminating against employees who live in New Jersey in violation of the LAD. We acknowledge the possibility that the remedy of reinstatement authorized

by the LAD, N.J.S.A. 10:5-17 might constitute an affront to Illinois' sovereignty and we expressly preclude the award of reinstatement on remand. In all other respects, we are persuaded that the Appellate Division's refusal to extend comity to Illinois and to remand plaintiff's suit to the Law Division for trial constitutes the appropriate disposition of this appeal.

CHIEF JUSTICE PORITZ and JUSTICES O'HERN, GARIBALDI, STEIN, COLEMAN, LONG, and VERNIERO join in this opinion.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2373-97T5

MICHAEL J. MCDONNELL,

Plaintiff-Appellant,

v.

STATE OF ILLINOIS; STATE OF ILLINOIS, DEPARTMENT OF REVENUE; SAMUEL MCGAW; MICHAEL SCADUTO; JOSEPH BARTLETTI; JUAN MORALES; FRANK NUGNES; and BRIAN MCGRAIL,

Defendants-Respondents.

Argued: January 27, 1999–Decided March 15, 1999

Before Judges Stern, Braithwaite and Wecker.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Michael J. McDonnell argued cause *pro se*.

Stephen E. Klausner argued the cause for respondents (Klausner, Hunter & Rosenberg, attorneys; David L. Rosenberg and Mr. Klausner, on the brief).

The Opinion of the court was delivered by BRAITHWAITE, J.A.D.

The central issue in this appeal is whether plaintiff, a New Jersey resident and former employee of the State of Illinois at the New Jersey field office of the Illinois Department of Revenue (IDOR), may sue the State of Illinois in a New Jersey Court for age discrimination under the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42. Plaintiff filed a complaint against defendants alleging that he was denied promotions and terminated from his employment because of his age. Plaintiff's complaint also sought relief for: (1) alleged violations of the IDOR employee handbook grievance procedure; (2) intentional infliction of emotional distress; (3) negligence; and (4) violations of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1140.

Defendants moved to dismiss all counts of plaintiff's complaint for lack of subject matter jurisdiction and, alternatively, for summary judgment on the intentional infliction of emotional distress and negligence claims. Defendants' motion was denied. Thereafter, defendants moved for reconsideration. On reconsideration, the motion judge dismissed plaintiff's complaint finding that: (1) Illinois law applied; (2) New jersey did not have jurisdiction; (3) the LAD did not apply to the State of Illinois; (4) plaintiff failed to comply with the notice provisions of the New Jersey Tort Claims Act; (5) plaintiff failed to present evidence to support a claim for intentional infliction of emotional distress; and (6) an ERISA claim must be brought in federal court, and therefore our State courts lacked jurisdiction.

Plaintiff concedes that the motion judge properly dismissed the ERISA claim but contends that the judge erred in dismissing the remaining counts of his complaint. We hold that New Jersey has jurisdiction, that New Jersey law applies, and that the LAD does apply to the State of Illinois as an employer in this State. We therefore reverse the dismissal of the plaintiff's LAD claim found in count one of his complaint, and his claim for alleged violations of the IDOR Employee Handbook Grievance Procedure found in count two of his complaint. We affirm the dismissal of the remaining counts in his complaint.

I

Plaintiff is a New Jersey resident who was hired by the IDOR on November 28, 1988, as an "Accounting and Fiscal Administrative Career Trainee" to work in IDOR's New Jersey regional office in Paramus. On October 17, 1989, plaintiff was promoted to the position of Revenue Auditor I. Plaintiff performed audits of the tax records of individuals and business entities that were subject to Illinois taxes.

After his promotion to Revenue Auditor I, plaintiff was never promoted again. According to plaintiff, he was denied promotion because of his age. He was terminated from his position on August 10, 1993, when he was fifty-two years old. He asserts that he was terminated because of his age.

Defendants Juan Morales, Frank Nugnes, and Brian McGrail are all New Jersey residents and were employed by IDOR in positions superior to plaintiff. Defendants

Samuel McGaw, Michael Scaduto and Joseph Bartletti are Illinois residents. McGaw was the Commissioner of IDOR. Scaduto and Bartletti were superiors of plaintiff in the State of Illinois.

Plaintiff and defendants essentially agree on plaintiff's disciplinary history and the events leading up to his termination. In January 1993, plaintiff was suspended for five days after he allowed a "statute of limitations waiver to lapse," which resulted in a $700 loss to IDOR. Plaintiff was subsequently terminated after he allowed five tax payment checks, totaling $48,900, to sit on his desk for approximately six weeks. According to the individual defendants, when plaintiff was confronted, he denied knowing that he had the checks. Plaintiff disputes that he denied knowing that he had the checks.

While plaintiff was employed by IDOR, all of his paychecks were issued from the State of Illinois. No New Jersey taxes or other New Jersey deductions were withheld from his salary. In addition, following his termination, plaintiff filed a claim for unemployment compensation benefits with the Illinois Department of Employment Security and ultimately received unemployment compensation payments from Illinois.

II

We note at the outset that defendants do not urge that the Superior Court of New Jersey does not have personal jurisdiction.

> There are two types of personal jurisdiction: specific and general.

> Specific jurisdiction is established when a defendant's acts within the forum-state give rise to the cause of action.
>
> In contrast, when the defendant's presence in the state is unrelated to the subject matter of the lawsuit, general jurisdiction may be obtained based on the defendant's "continuous and Substantial" contacts with the forum.
>
> [*Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443, 492 (App. Div. 1998) (citations omitted).]

Clearly the State of Illinois and the individual defendants have "minimum contacts" with New Jersey. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). "'[I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws.'" *Waste Management Inc. v. Admiral Ins. Inc. v. Canadian General Ins. Co.*, 513 U.S. 1183, 115 S.Ct. 1175, 130 L.Ed. 2d 1128 (1995) (*quoting Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed. 2d 1283, 1298).

The motion judge, in ruling that Illinois law applied to plaintiff's claims, seems to have confused choice of law with the issue of personal jurisdiction. Even if Illinois law applied, which we do not hold, that would not preclude a New Jersey court from exercising personal jurisdiction and adjudicating the matter applying Illinois law. *See Gantes v. Kason Corp.*, 145 N.J. 478, 484 (1996); *Veazey v. Doremus*, 103 N.J. 244, 247-49 (1986); *Keil v. National Westminster Bank*, 311 N.J. Super. 473, 488-91 (App. Div. 1998).

Defendants assert that "sovereign immunity and/or comity bars the New Jersey courts from exercising personal jurisdiction over the State of Illinois." We disagree. The doctrine of sovereign immunity "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." *Nevada v. Hall*, 440 U.S. 410, 416, 99 S.Ct. 1182, 1186, 59 L.Ed. 2d 416, 422 (1979).

In *Hall* the United States Supreme Court held that the federal constitution does not prohibit one state from exercising jurisdiction over another. Plaintiff, John Hall, a California resident, was involved in a car accident with an employee of the University of Nevada (University), which is an instrumentality of the State of Nevada (Nevada). 440 U.S. at 411, 99 S.Ct. at 1184, 59 L.Ed. 2d at 419. At the time of the accident, the University employee was engaged in official business while driving a car owned by Nevada. *Ibid.* The accident took place in California. *Ibid.*

Hall and his mother filed suit in a California state court and properly served the University and Nevada. *Id.* at 412, 99 S.Ct. at 1184, 59 L.Ed. 2d at 419. The trial court quashed service on Nevada, but its decision was reversed by the California Supreme Court, which held that under California law, Nevada could be sued in a California court. *Ibid.* The matter was remanded and proceeded to trial. *Ibid.*

At trial, Nevada filed a motion to limit the amount of damages that plaintiffs could recover because Nevada's liability was limited to $25,000 under its tort claims act. *Ibid.* Nevada argued that the Full Faith and Credit

Clause of the United States Constitution required the California court to apply Nevada's statute limiting damages. *Id.* at 412-13, 99 S. Ct. at 1184, 59 L.Ed. 2d at 420. Nevada's motion was denied, and the plaintiffs were awarded $1,150,000. *Id.* at 413, 99 S.Ct. at 1184, 59 L.Ed. 2d at 420-21. The California Court of Appeals affirmed the judgment, and the California Supreme Court denied review. *Ibid.* The United States Supreme Court, however, granted certiorari and affirmed the California Court of Appeals' decision. *Id.* at 414, 427, 99 S.Ct. at 1185, 1191, 59 L.Ed. 2d at 421, 429.

The Supreme Court rejected the position that sovereign immunity barred California from exercising jurisdiction over Nevada. Moreover, the Court's examination of Article III and the Eleventh Amendment of the United States Constitution did not reveal any basis to prohibit California from exercising jurisdiction over Nevada. *Id.* at 421, 99 S.Ct. at 1188, 59 L. Ed. 2d at 425. "[T]here is no constitutional limitation upon the exercise of jurisdiction by the courts of one state over another state, even absent consent of the defendant state." *Baldwin Enters., Inc. v. Town of Warwick, N.Y.*, 226 N.J. Super. 549, 552 (App. Div.), *certif. denied*, 113 N.J. 364 (1988).

Although sovereign immunity does not prohibit New Jersey from exercising jurisdiction over Illinois, principles of comity may cause New Jersey to decline jurisdiction. *Ibid.* "But even though New Jersey jurisdiction is recognized, the question remains whether its exercise should now fairly be withheld under principles of comity." *Interstate Wrecking Co. v. Palisades Interstate Park Comm'n*, 57 N.J. 342, 350 (1971). Here, the application of comity requires us to examine the public policy of

both New Jersey and Illinois. *Baldwin Enters., supra*, 226 N.J. Super. at 553.

Plaintiff's claim is essentially one for age discrimination. Both Illinois and New Jersey have a strong public policy against discrimination. Illinois has a statute known as the Illinois Human Rights Act (HRA), 775 *Ill. Comp. Stat.* 5/1-101 to 5/10-103 (West 1993) which, among other things, prohibits discrimination in employment. Our review of that statute, however, convinces us that plaintiff would be unable to seek relief for his claim of age discrimination. First, the purpose of the HRA is "to promote the public health, welfare and safety of the *People of Illinois* by preventing unlawful discrimination in employment . . . ." 775 *Ill. Comp. Stat.* 5/1-101 (emphasis added). Second, the avowed public policy of Illinois with respect to employment discrimination is "[t]o secure *for all individuals within Illinois* . . . freedom from discrimination . . . ." 775 *Ill. Comp. Stat.* 5/1-102(A) (emphasis added). Third, and perhaps most significantly, the definition of employee includes "[a]ny individual performing services for remuneration *within the State* for an employer." 775 *Ill. Comp. Stat.* 5/2-101(A)(1)(a) (emphasis added). The definition of employer includes the State of Illinois "and any political subdivision, municipal corporation of other governmental unit or agency, without regard to the number of employees." 775 *Ill. Comp. Stat.* 5/2-101(B)(1)(c).

We did not find any case law that addresses the issue of whether the HRA applies to a non-Illinois resident who is employed by the State of Illinois outside of its borders. However, the clear language of the HRA, as well as its stated purpose, leads us to the conclusion that the Illi-

nois Legislature intended that, in this context, the HRA should apply only to Illinois residents who work for employers within the State of Illinois. We are satisfied that an Illinois court would similarly interpret the HRA as we do.

> The cardinal rule of all statutory construction, to which other rules are subordinate, is that the true intent and meaning of the legislature must be ascertained and given effect. The language used in a statute is the primary source for determining this intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted. Absent statutory definitions indicating a different legislative intention, courts will assume that words have their ordinary and popularly understood meaning.
>
> [*General Motors Corp. v. Industrial Comm'n*, 338 N.E. 2d 561, 564 (Ill. 1975) (citations omitted).]

In the Interest of M.G., 307 N.J. Super. 348, 354 (App. Div.), *certif. denied*, 154 N.J. 607 (1998) (holding that statute's "*[c]lear language precludes . . . any meaning other than as expressed*"); *State v. Panther Valley Property Owners Ass'n*, 307 N.J. Super. 319, 329 (App. Div. 1998) (holding that *statute's plain language* "should be '*given its ordinary meaning* and [be] construed in a common sense manner to accomplish the legislative purpose' ") (citation omitted). Accordingly, we conclude that although Illinois has a strong public policy against discrimination, by the clear language of the statute, it does not apply to plaintiff.

When we look to the LAD, plaintiff's age discrimination claim is covered, and the only issue is whether it

applies to Illinois. We are satisfied that the definition of employer, under these circumstances, includes Illinois. The LAD provision applicable to plaintiff's claim prohibits an *employer* from denying promotions and discharging an employee because of the employee's age. *N.J.S.A.* 10:5-12a (emphasis added). Illinois and IDOR were plaintiff's employer. Under the LAD, however, the term "employer" does not specifically identify non-New Jersey governmental entities. The LAD defines employer as follows: "employer includes all persons as defined in subsection a[1] of this section unless otherwise specifically exempt under another section of this act, and includes *the State*, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." *N.J.S.A.* 10:5-5e (emphasis added).

One could argue that the language "the State" in the definition of employer only applies to New Jersey. Support for this construction can be found by comparison with other statutes where the Legislature clearly sets forth that "the State" includes other states of the United States. Compare, *N.J.S.A.* 2A:41A-1 (Interstate Compact on Interpleader identifying "[a] State" to mean, among other things, "a State of the United States") and *N.J.S.A.* 2A:159A-2(a) (Interstate Agreement on Detainers identifying "state" to mean, among other things, "a State of the United States") and *N.J.S.A.* 30:7B-2(h) (Interstate Transfers of Mentally Ill Act identifying "State" to mean,

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[1] *N.J.S.A.* 10:5-5a states: "Person" includes one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

among other things, "any State . . . of the United States") with *N.J.S.A.* 18A:72-10(a) (Higher Education Assistance Authority Law referring to institutions "outside the State") and *N.J.S.A.* 59:1-3 (Tort Claims Act identifying "State" to mean "the State") and *N.J.S.A.* 59:13-2 (New Jersey Contractual Liability Act identifying "State" to mean "the State"). These examples could arguably support the position that the words "the State" found in the LAD definition of employer apples only to New Jersey because in those situations where the Legislature intended a different meaning it has clearly said so.

However,

> Unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction, the following words and phrases, when used in any statute and in the revised statutes, shall have the meaning herein given to them.
>
> . . .
>
> State. The word "State" extends to and includes any State, territory or possession of the United States, the District of Columbia and the Canal Zone.
>
> [*N.J.S.A.* 1:1-2]

Here, the LAD does not otherwise expressly provide that the phrase "the State" is limited solely to New Jersey. Moreover, the extension of the phrase to include Illinois is not "repugnant to such construction," *ibid.*, because the LAD is to be liberally construed to further its goal of eradicating "'the cancer of discrimination.'" *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 533

(App.\Div.), *certif. granted*, 156 N.J. 381 (1988) (quoting *Fuchilla v. Layman*, 109 N.J. 319, *cert. denied sub. nom.*, *University of Medicine and Dentistry of N.J. v. Fuchilla*, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed. 2d 51 (1988)).

Under the circumstances, to construe the LAD otherwise, so as to not include Illinois, would be contrary to its purposes. The State of Illinois maintains an office in New Jersey employing New Jersey residents where it reaps certain benefits from doing business in New Jersey. To limit the reach of the LAD so as to exclude other states who do business here and employ our residents would be manifestly unfair to those New Jersey residents employed by those states. The State of New Jersey, unfortunately, is not the only state in our union that is capable of discrimination. Other states who do business here and subject our residents to acts of discrimination should be subject to our laws. We do not think that the LAD, in the area of employment discrimination, should apply to the State of New Jersey and not to another state operating within our borders and employing our residents. To interpret the LAD otherwise would be "irrational." *Dale*, *supra*, 308 N.J. Super. at 533.

Although the policies of both New Jersey and Illinois are similar with respect to discrimination in employment, plaintiff has no remedy in Illinois. Our failure to exercise jurisdiction would leave plaintiff without a remedy for his claims. Leaving plaintiff with no remedy either under the law of the state where he resides and worked, or under the law of the state that employed him, is repugnant to New Jersey's statutorily based policy of protecting its residents from discrimination, *N.J.S.A.* 10:5-3. When applying principles of comity, one important in-

terest of the forum state is the protection of its citizens. *Baldwin Enterprises, supra*, 226 N.J. Super. at 552.

Moreover, despite the similarity in purpose between New Jersey's and Illinois' anti-discrimination statutes, they diverge greatly in the remedy to be awarded to a victim of discrimination. New Jersey permits recovery of "[a]ll remedies available in common law tort actions . . . ." *N.J.S.A.* 10:5-13. Illinois is not so generous. It limits a plaintiff's recovery under the HRA to his or her actual damages. *See* 775 *Ill. Comp. Stat.* 8A/104. Further, HRA claims in the state of Illinois may not be instituted in a court proceeding, but only before the Human rights Commission created by the HRA. 775 *Ill. Comp. Stat.* 8/101. Even if a claimant under the HRA could recover in tort, the damages would be limited to $100,000. 705 *Ill. Comp. Stat.* 505/8(d).

When we consider the public policy of New Jersey and Illinois in these circumstances, principles of comity do not cause us to conclude that New Jersey ought to decline jurisdiction over Illinois. The circumstances are compelling for exercising jurisdiction considering our strong public policy against discrimination and the lack of an available remedy to plaintiff under Illinois law.

III

We deem it appropriate to comment briefly on the choice of law issue. Based on our earlier discussion, we are satisfied that New Jersey law applies to plaintiff's viable claims. New Jersey's choice of law rule "applies a flexible 'governmental interest' standard, which requires application of the law of the state with the greatest

interest in resolving the particular issue that is raised in the underlying litigation." *Gantes v. Kason Corp.*, *supra*, 145 N.J. at 484 (citation omitted). "The initial prong of the governmental interest analysis entails an inquiry into whether there is an actual conflict between the law of the respective state . . . ." *Ibid.* Here, as noted *supra*, there is a conflict because plaintiff would not have a remedy in Illinois.

The second prong of the analysis "seeks to determine the interest each state has in resolving the issue in dispute. That analysis requires the court to 'identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties.'" *Id.* at 485 (quoting *Veazey*, *supra*, 103 N.J. at 248).

The purpose of HRA is to prevent unlawful discrimination in order to promote the health, welfare and safety of Illinois' citizens. In the context of employment discrimination, Illinois' policy is to protect Illinois' residents who work for employers within the State of Illinois. By contrast, the LAD also seeks to prevent unlawful discrimination, but is much broader in its scope than the HRA. It is to be liberally construed. "[T]he clear public policy of this State is to abolish discrimination in the work place." *Fuchilla*, *supra*, 109 N.J. at 334.

> As the Legislature has declared, "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." The day is long past when any employee need endure discrimination because of his or her race, religion, national origin, [age] or gender.

> Employment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry.
>
> [*Id.* at 334-35 (citations omitted).]

Plaintiff is a New Jersey resident. The acts that are the basis of his claims occurred in New Jersey. Three of the individual defendants are New Jersey residents. Illinois maintains an office in New Jersey to assist in the collection of taxes from individuals and entities liable for Illinois taxes. Applying our choice-of-law rule, New Jersey law applies only to plaintiff's viable claims.

IV

The motion judge erroneously concluded that plaintiff failed to comply with the notice provision of the New Jersey Tort Claims Act (Act). *N.J.S.A.* 59:8-8 and -9. Claims of discrimination are not subject to the notice requirements of the Act. *Fuchilla*, *supra*, 109 N.J. at 337-38. The Illinois statute covering notice of claims is likewise not applicable. Any violation under the HRA is brought before the Illinois Human Rights Commission which has exclusive jurisdiction over claimed violations of the HRA. 775 *Ill. Comp. Stat.* 8/101; *Mein v. Masonite Corp.*, 485 N.E. 2d 312, 315 (Ill. 1985). The Illinois notice provision applies only to claims filed in its court of claims. 705 *Ill. Comp. Stat.* 505/22-1. Further, applying our choice-of-law rule, on the issue of notice, New Jersey law would apply. Here, as noted *supra*, New Jersey has the most significant interest in the litigation *Gantes*, *supra*, 145 N.J. at 492-93.

V

Finally, we affirm the dismissal of the last three counts of plaintiff's complaint. Plaintiff's negligence claim is barred by the Workers' Compensation Statute. *N.J.S.A.* 34:15-7. It is also barred in Illinois. 820 *Ill. Comp. Stat.* 305/3 *Mier v. Staley*, 329 N.E. 2d 1 (Ill. App. Ct. 1975).

Plaintiff concedes that his ERISA claim was properly dismissed. We agree. It can only be commenced in federal court.

We also affirm the dismissal of plaintiff's claim for intentional infliction of emotional distress. Because defendant's motion, in this respect, was based on matters outside the record, it was in the nature of a motion for summary judgment. R. 4:6-2(e). "Generally speaking, to establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe." *Buckley v. Trenton Savings Surety*, 111 N.J. 355, 366 (1988). The same standard applies under Illinois law. *See Pavilon v. Kaferly*, 561 N.E. 2d 1245, 1250 (Ill. App. Ct. 1990). Plaintiff's allegations do not give rise to a finding that defendants' conduct exceeded "all possible bounds of decency." *Ibid.*; *Taylor v. Metzger*, 152 N.J. 490, 509 (1998). No reasonable fact-finder could conclude that defendants' conduct satisfied the standard for intentional infliction of emotional distress. The judge properly granted summary judgment to defendants with respect to this claim. *See Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995).

VI

We reverse the dismissal of count one and two and remand for further proceedings consistent with this opinion. We affirm in all other respects.

SUPERIOR COURT OF NEW JERSEY

Peter F. Boggia
Judge

Bergen County Court House
Hackensack, N.J. 07601-7686

October 24, 1997

David L. Rosenberg, Esq.
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Mr. Michael J. McDonnell
97 Abbey Court
Ramsey, New Jersey 07446

Re: McDonnell v. State of Illinois
Docket No. Ber-L-006904-95

Gentlemen:

This matter comes before the Court by way of defendant's Motion for Reconsideration. This case arises out of an alleged wrongful discharge. The plaintiff, a New Jersey resident, was an employee of the State of Illinois. He was working out of the Paramus office as a field auditor for the Department of revenue of the State of Illinois.

Defendant maintains that the New Jersey Courts lack jurisdiction to hear this matter. At all times relevant to this litigation, the plaintiff's employment with the Illinois Department of Revenue was governed by the laws of the State of Illinois. All the terms of employment, in-

cluding salary, pension, benefits and promotions are fixed in Illinois by statute. The decision to hire the plaintiff was made in the Springfield, Illinois office. The plaintiff received his pay checks from Illinois and after his termination, received unemployment benefits from the state of Illinois. The plaintiff has been unable to offer any testimony that his employment was not governed by Illinois law or that the decision to terminate his employment was made in New Jersey. Accordingly, the Court held that the plaintiff's relationship is not governed by New Jersey law, but rather Illinois law.

Plaintiff attempts to establish jurisdiction by relying on *Nevada v. Hall*, 440 U.S. 410 (1979). However, this reliance is misplaced because the Hall case and the matter before this court are factually distinct. The *Hall* case involved an automobile accident caused by the negligence of a vehicle owned by the State of Nevada while in California. The United States Supreme Court held, that suits involving traffic accidents occurring outside the State of Nevada could hardly interfere with Nevada's capacity to fulfill its sovereign responsibilities. *Id.* at 424. This is not the matter in the case before this court. Mr. McDonnell was an employee of the State of Illinois working in the Paramus New Jersey office. Unlike *Hall*, which involved an automobile negligence case, this matter concerns the decision of a state to terminate the employment relationship of one of its employees. To second guess the decision by the State of Illinois to terminate an employee in these fiscally difficult times would clearly offend the sovereign responsibilities of Illinois. Accordingly, this Court will not second guess the decisions by the State of Illinois regarding employment relationships.

Additionally, this Court believes that the legislative intent behind the LAD was to be binding only upon the State of New Jersey. *See N.J.S.A.* 10:5-5(e). Therefore, New Jersey's LAD does not apply to the State of Illinois.

The plaintiff in the matter before this Court has failed to comply with the Notice Provisions of the New Jersey Tort Claims Act (Title 59) or the applicable Illinois statute. As a result of the plaintiff's failure to comply with the Notice Provisions, the State of Illinois was not given the advanced warning of the potential claim against it. Accordingly, the tort claims against the State of Illinois must be dismissed as a matter of law.

Plaintiff has failed to provide any evidence of extreme or outrageous conduct as required by *Buckley v. Trenton Savings*, 111 N.J. 344 (1988), to establish a claim for emotional distress. Therefore, the Fifth Count for emotional distress is dismissed as a matter of law. The Fifth Count of plaintiff's complaint alleges a violation of ERISA. Under Federal law, an ERISA claim must be brought in Federal Court. This Court lacks the subject matter jurisdiction to hear the ERISA claim as a matter of law, and the Fifth Count must be dismissed.

Accordingly, the Court grants the defendants' Motion for Reconsideration, and all of the plaintiff's claims against the State of Illinois are dismissed as a matter of law for the aforementioned reasons.

Very truly yours,

Peter F. Boggia, J.S.C.
PFB: jak

SUPERIOR COURT OF NEW JERSEY

Peter F. Boggia
Judge

Bergen County Court House
Hackensack, N.J. 07601-7686

September 19, 1997

David L. Rosenberg, Esq.
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Mr. Michael J. McDonnell
97 Abbey Court
Ramsey, New Jersey 07446

RE: McDONNELL VS. STATE OF ILLINOIS, ET AL.
DOCKET NO.: BER-L-006904-95

Gentlemen:

This matter comes before the court by way of defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction, defendants' motion for more specific answers to interrogatories and plaintiff pro se's motion for default for failure to comply with discover requests.

This case arises out of an alleged employment discrimination. Plaintiff, a New Jersey resident, was an employee of the State of Illinois Department of Revenue. He was employed as a field auditor for the Department in the Paramus, New Jersey office.

Defendants contend that the Courts of New Jersey do not have jurisdiction over this matter. This court dis-

agrees. The plaintiff is a New Jersey resident, working for an office in this state. Furthermore, plaintiff alleges that the actual decision to terminate his employment was made in the New Jersey office.

Therefore the court denies defendants' motion to dismiss.

As to the remaining discovery related motions; the court denies those motions as well. This case has a trial date for October 14, 1997. The time for discovery is long past and the granting of these motions would only interfere with the trial date.

Yours very truly,

Peter F. Boggia, J.S.C.
PFB:jak

Supreme Court, U.S.
FILED
JUN 30 2000
CLERK

(2)

No. 99-1934

In The Supreme Court of the United States

STATE OF ILLINOIS, et. al.,
Petitioners

v.

MICHAEL J. McDONNELL,
Respondent,
Pro Se

On Petition For A Writ Of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

Michael J. McDonnell,
Respondent, Pro Se

97 Abbey Ct.
Ramsey, NJ 07446
201-825-3771

36pp

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent/Plaintiff, Pro Se Michael J. McDonnell brought suit in New Jersey Superior Court, Law Division on 7/10/95. I alleged that defendants wrongfully terminated me in violation of the age provisions New Jersey Law Against Discrimination

Defendants in that suit were:

The State of Illinois;
State of Illinois, Department of Revenue;
Samuel McGaw, Commissioner of Revenue
Joseph Bartletti;
Juan C. Morales;
Frank Nugnes
Brian McGrail
Docket No. BER-L-6904-95

On August 4, 1997, Defendants filed a motion alleging lack of jurisdiction and other grounds.

On Sept. 19, 1997 the Trial Court ruled in my favor and dismissed Defendants motion.

After a Motion For Reconsideration by Defendants, the Trial Court reversed itself and dismissed my suit on October 24, 1997.

On 12/26/97, I filed an appeal of the above ruling to the Appellate Division of the New Jersey Superior Court. I prevailed in a unanimous reversal of the trial court ruling. This decision may be referenced at 319 N.J. Super 324, 748 A. 2d 1105 (1999)

Defendants/Appellants then filed an appeal with the New Jersey Supreme Court. I prevailed, in a 7-0 Per Curiam decision, in that proceeding. This case is referenced at 163 N.J. 298, 748 A.2d 1105 (2000).

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Table of Cited Authorities

1. United State Supreme Court Cases

Nevada v. Hall, 440U.S. 410, 1979

Kimel v. Florida Board of Regents, __U.S. __, 120 S.Ct. 631 (2000))

Alden v. Maine, 527 U.S. 706 (1999)

2. Other Cases

McDonnell v. State of Illinois, 163 N.J. Super 298, 748 A2d. 1105 (1999)

McDonnell v. State of Illinois, 163 N.J. 298, 748 A2d 1105 (1999)

3. Statutes

Illinois Human Rights Act, 775 ILCS, 5/1-101, et. seq.

New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq.

Reasons for Denying the Writ

I. My opposition based on Court Rule 14(4)

II. My opposition based on the premise that no conflict of laws exists as to Nevada v. Hall 440 U.S. 410, (1979). Further, that there is no substantive difference with respect to sovereign responsibilities between Hall and the case at bar.

III. My opposition based on the premise that recent cases cited by Petitioner do not imply that Nevada v. Hall needs be reevaluated.

I. Opposition based on Court Rule 14(4)

Under the Rules of the Court, (Rule 14(4)), "The failure to present with accuracy, brevity, and clarity, whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition".

Rule 14,1(g) requires "A concise statement of the case setting out the facts material to consideration of the questions presented..."

I respectfully submit that Petitioners have distorted the facts of the matter to such an extent as to warrant a denial of their petition.

I submit that the version presented by Petitioners is a cynical gambit, based on an assumption that I would not file a brief in opposition.

The version that I present herewith is, in substance, the same as the one presented to the Appellate and Supreme Courts of New Jersey.

Petitioners did not challenge my version of the facts before those courts.

I am mindful that the facts presented below must be proven as discriminatory under the New Jersey Law Against Discrimination.

I am presenting the facts (supported by appended memos) in order to establish that Petitioners have intentionally misled the Court for purposes of obtaining a Writ from this Court, in violation of Rule 14.

I beg the Court's indulgence for the length and somewhat argumentative nature of my presentation in this in this regard. However, I feel that it is essential for me to make a full

presentation of the facts in order to demonstrate a clear violation of Rule 14 .

Petitioners have not responded to any of my interrogatories since 1995.

However, when I was fired, I asked for, and received most of my local personnel file. The appended memos are a part of that record.

The following account is given in (Statement of the Case), by Petitioners as the immediate cause of my termination:

"..and later that year *it was discovered* that he had failed for almost two months to *turn in several checks that had been tendered to him* in payment of tax obligations. *After a full review* by Respondents supervisors in Paramus, the decision to fire Respondent was made by officials at the Department's central office in Springfield, Illinois. Respondent was fired in August 1993. App. 11-12"

The memos appended to this brief will suffice to demonstrate the version of the events provided by Petitioners in this proceeding is intentionally distorted.

Petitioners may argue that their version does not literally distort. However, the net result is that an impression of gross negligence and/or misconduct was intentionally conveyed.

By way of a reply to the Petitioners narrative above, I respectfully submit the following facts and comments:

I /a- Events Leading To My Termination.

1. On or about May 24, 1993, correspondence related to one of my audits arrived in the IDOR office in Paramus, New Jersey.

2. The correspondence included a cover letter, voluminous tax returns and several checks totaling approximately $48,000.

3. The checks were payable to the Illinois Department of Revenue. This remittance was in payment of a tax obligation as determined by audit.

4. A procedure of long standing was in effect, concerning the handling of correspondence and depositing of checks.

According to this procedure, an administrative employee would open all mail, examine the correspondence, and remove any checks. The administrative worker would then make photocopies of any checks, attach the photocopies to the correspondence and deposit the checks in the IDOR bank account.

The administrative employee would then put the correspondence and photocopies of the checks in the mail slot of the auditor who was working on the case.

5. In the particular incident that resulted in my discharge, the administrative worker opened the correspondence and failed to notice that checks were attached to the correspondence.

6. As a result of the oversight of the administrative worker, the actual checks, and not photocopies thereof, were placed in my mail slot.

I had never received checks in my mail slot before. Auditors, as a rule, do not handle checks at all.

7. On or about May 24, 1993, I retrieved my mail for the day from my mail slot.

I perused the correspondence too briefly. I was working on another case at the time.

I failed to notice that the actual checks, and not the accustomed photocopies, were attached.

8. My error consisted of not catching the error of the administrative employee. I placed the entire correspondence

(including the checks) in my filing cabinet with the rest of the file for that case.

9. I resumed work on the case in question on or about July 5, 1993. This lapse in time was not at all unusual, since I maintained a caseload of approximately 12 ongoing audits.

At that time, I discovered that checks were attached to the correspondence. I immediately brought the checks forward to an administrative worker for deposit.

10. This sums up the entire incident.

I/b - Alleged Misleading Statements Made By Petitioners in This Proceeding

1. The *"several checks"* mentioned, were received in one envelope, from one taxpayer. The clear implication of the Petitioner is that several different events were involved. This event involved one incident of oversight.

2. They were not personally "tendered". The clear implication of Petitioners is that I somehow pocketed checks on more than one occasion.

The above facts are a far cry from "several checks being tendered to Mr. McDonnell"

Such activity, if true, would indicate serious misconduct or gross negligence on my part.

Petitioners appear to be willing to take the risk that the Court might so assume.

3. As mentioned above, the checks were mailed to the IDOR and initially mishandled by another employee. In the course of their "full inquiry", incredibly, no mention at all was made of the role played by the other employee, or that my responsibility and error, was secondary.

4. Petitioners stated that "*it was discovered* that he failed to turn in several checks that were tendered to him." The clear implication of this remark is that I had done something intentionally wrong, or was grossly negligent, and that their investigation found me out.

I discovered the checks and brought them forward.

Petitioners made much of "*.. failed for almost two months turn in*...".

There is an implication of intentionally failing to "turn in" the checks for some nefarious reason.

Petitioners failed to mention that this incident occurred in the context of my carrying a caseload of about 12 cases.

5. Petitioners claim that a *full review was conducted* .
As the facts presented below, will confirm, this is utterly false and misleading.

6. Incredibly, the role of the administrative worker in the error was not even mentioned in either their memoranda, which were used as a justification for my discharge, or in the Statement of Case given in this Proceeding

I /c - Written and Oral Statements Made by Respondent and Petitioner and Actions Taken Against Respondent.

1. On July 7, 1993, I was asked by Supervisor/Petitioner Brian McGrail to write a memo (Exhibit 1) explaining the events involved.

I was under the impression that this was a mundane request. McGrail, in no way, indicated that the matter was considered job threatening, or that the vaunted "full inquiry" was under way. I was again working on another of my cases.

I learned, only later, that a figurative lynching party was being organized.

In this memo, much to the delight of Morales, I made a small and unintentional misstatement.

I said that "When the material was received, I had no reason to expect checks as I had not even finalized the audit."

This was incorrect. In my haste, I did not consult my audit log before writing the memo. The statement is incorrect in that I had previously indicated in my log (Exhibit 2), that I expected to receive checks from the taxpayer in question..

However, to say that I did not expect checks in my mail slot is also correct.

The plain fact is that my state of mind, when I handled the correspondence on or about May 24, 1993 was that I was not expecting checks. It simply did not register with me, at that time, that there were checks attached.

It is also true that it was highly unusual for checks to be sent before an audit was finalized.

I indicated that the checks were received on 5/26. The actual date the checks were received was on 5/24. This entry was made on or about the date that I noticed the checks were in my filing cabinet, which would have been on or about 7/5/93.

It is obvious that I could not have made this entry until I focused on the checks.

2. Almost immediately after giving my memo to McGrail, on July 7, I noticed that I had erred in the way stated above.

I went to McGrail and explained this to him. I explained to McGrail that my state of mind, at the time the checks were placed in my mail slot, was truly that I was unaware that actual checks were attached.

McGrail indicated that he understood my explanation of the matter, then suggested that we go into the office of his superior Juan Morales to discuss the matter.

It is proven, from a reading of Exhibit 3, that this explanatory meeting took place.

McGrail's memo to Morales, written the day after my memo to Morales states: "In the early afternoon, Mike, you and I met to discuss this incident..."

The following deductions can be made with a high degree of certainty from (Exhibit 3):

a. I had discussed the matter thoroughly with McGrail prior to the meeting.

b. I had indicated that the matter was inadvertent.

c. The issue of expecting or not expecting checks was discussed by McGrail and me, prior to the meeting.

d. There was little doubt on the part of McGrail as to the event was an oversight.

e. Therefore, his reference to "further investigation " is disingenuous and capricious.

f. It was disingenuous for McGrail and Morales to focus on the memo after our meeting had rendered the memo inoperative. I submit that I was justified in believing that the memo had been trumped or superceded by the meeting.

3. On July 7, after composing my memo, and advising McGrail of the error mentioned above, the explanatory meeting was held.

Morales, McGrail and I discussed the matter. The event and my memo containing its misstatement were discussed. Morales and McGrail indicated that they understood the matter in full.

The matter was aired in full, including my correction of my memo. A reading Exhibit 3 establishes that the "expectations" issue was, and of necessity had to be discussed.

I left the meeting fully satisfied that I had set the record straight in what could only be interpreted as an oversight in any case.

I had no further discussions with any member of IDOR management regarding this incident until I was summarily fired.

Despite Petitioners claim that a full inquiry was undertaken, I had no opportunity to explain myself in any way.

I was told that I had no right of grievance, since I was not covered by a union contract as are "in state" employees.

Despite the matter having been fully aired at the meeting, McGrail capriciously backtracked as if the matter had not been resolved:

"..Further investigation into Mike's EDC-5 (audit history worksheet), revealed that on 5/20/93 a statement indicated that Mike was expecting the checks. Moreover, on 5/26/93, Mike's EDC 5 states that he received a summary letter and checks from the taxpayer.

It is perfectly obvious that a case was being trumped up, when they failed to take my correction into account and resorted to reaching into my mind, as to what I was expecting or not expecting. *(knowing full well the actual state of the case)*

Auditors do not intentionally put checks for deposit in their filing cabinets

McGrail said (Exhibit 3) that I made statements in our meeting that contradicted statements in the audit log. *This is false.*

For this statement to be true, I would have had to nonsensically stick to my inadvertent remark that I was not expecting to receive checks.

I had, of necessity, reviewed my log prior to the meeting.

There is no way that I could, or would, have maintained the contradictions once I had looked at the log.

The log clearly indicates that there was an error in the memo. It is established that I had so stated prior to the meeting, and could not have maintained otherwise in the meeting.

To make a case of "expecting or not expecting", is reminiscent of the 1930's Stalin purge trials, where the hapless defendants had to confess not only what they did, but also what they were thinking.

I submit that the Petitioners, realizing that their case was basically absurd, attempted to justify their actions by resorting to capricious word games. They set out to obscure the inadvertent and insignificant nature of the event.

The overriding reality is that any confusion regarding my expectation as mentioned in my log could not fail to have been cleared up by the airing of the matter in the meeting of July 7, 1993.

The very fact that I was terminated over such a trivial matter, establishes that the memos of Morales, McGrail and Bartletti were disingenuous.

At the time of the meeting, it was clear to all three of us that my memo had been trumped by the meeting.

I was not asked to provide a written correction after the meeting.

It is obvious that they wanted my memo to appear to be my last word on the event. An examination of Exhibit 3 bears this out.

Petitioners have artfully created a false test of my credibility.

This argument is vitiated by the fact that all issues were fully and completely aired at the meeting of July 7.

4. On July 8, 1993, Morales wrote a memo to his superior in Illinois, Petitioner Joseph Bartletti. (Appendix-Exhibit 4.)

Realizing that a simple inadvertent error would not suffice as a cause of termination, Morales set about embellishing the event.

His memo, complete with transparent crocodile tears, made no mention of the fact that the greater part of the error was that of another person with primary responsibility for handling the checks in the first place.

Additionally, this memo was written as if the previous day's meeting, between the three of us had not occurred.

In view of these two glaring omissions, the capricious and discriminatory intent of Morales is proven.

It is certainly not much of a "full inquiry".

He makes much of my "expecting checks, etc.". He refers to my "latest explanation", knowing full well that the latest explanation was given at the July 7 meeting, and not in my memo.
This entire exercise on the part of Morales, McGrail, and Bartletti was nothing short of ridiculous.

I was not aware of his memo to Morales or Morales' memo to Bartletti until after I was fired.

There were no further communications with me, after the July 7, 1993 meeting, until I was summarily fired.

I was called on the phone, while on an out of town audit, 300 miles from home. I was told to cease and desist my work on the spot, and turn in my computer and credentials as soon as I returned to New Jersey. I was not even given two weeks notice.

These facts make a mockery of the assertion in the present Petition that a "full investigation" was conducted, and that they "did everything they could " to save my job.!!

Exhibit 4 and 5 make it obvious that no real inquiry was desired.

On the contrary, the emphasis was on immediate dismissal.

My memo was in no way a sworn statement . I was not informed that my memo was part of an "investigation", which might involve my job.

I did not think for a moment that management would hold me accountable over such a minor matter and in such a grotesque way.

I submit that it was a desire, to paint the event as involving wrongdoing, that motivated Morales . *He knew the true facts. from the beginning*

5. On July 14, 1993, Petitioner Joe Bartletti, Morales superior in Illinois wrote a memo to Petitioner Mike Scaduto. (Appendix Exhibit-5).

In this memo, Bartletti states: "..Furthermore, when questioned on July 7 about the incident, Mr. McDonnell denied he knew he had the checks. A later review of the audit file contradicted what he told management on that day..."

This is a completely false and meaningless statement, offering no detail whatever.

Again, this is a transparent attempt to color the event as wrongdoing.

This memo takes the game one step further away from anything remotely resembling a "full investigation".

I believe that the "full investigation" consisted, for the most part, of the capricious memos appended herewith, along with any phone calls that might have been assisted their preparation. I submit that this entire exercise was a capricious farce.

6. In furtherance of their machinations, Petitioners went so far as to try to deny me unemployment compensation. They alleged wrongdoing on my part.

The Illinois Department of Employment Security conducted its own investigation and informed the DOR that there was no wrongdoing under the circumstances.

In their answer to my suit filed in 1995, Petitioners indicated misconduct as one of their defenses. As mentioned previously, the Illinois Department of Employment Security advised them that misconduct was not involved.

In pleadings before the Appellate Division and Supreme Court of New Jersey, Petitioners then switched their main line of defense to that of incompetence.

I pointed out in my filings with the New Jersey Appellate and Supreme Courts that the defense of incompetence was dubious.

I was told by the instructors, that I scored the highest mark of approximately 50 trainees in the final exam of the training class to become a revenue auditor for the IDOR. in 1989.

7. Petitioners have refused, since 1995, to answer any of my interrogatories. I have attempted to ascertain the actual monetary loss to the State of Illinois as a result of the oversight. In modern cash management systems, the taxpayer would suffer no loss from the date the check was written to the date actually presented to its bank. The interest payable to the State would still accrue until it logged in the check. Thus, it would appear that the matter was much ado about nothing.

I believe that, if this litigation is allowed to proceed on its merits in the Courts of New Jersey, I will have no difficulty in proving my case. I believe that I will be able to establish that Illinois' state employees, are by no means routinely fired for such inadvertent and innocent lapses such as delays in check cashing.

Also, McGrail's comment in Exhibit 3, indicates that there was no monetary loss involved.

If true, this would contradict an assertion in Petitioners Answer in that that there was a loss but that could not determine how much..

8. The Statute of Limitations lapse, referred to in the Statement of Case, is also a minor and commonplace event, and cost the State of Illinois the sum of $700.

I have asked Petitioners, in my, as yet unanswered, interrogatories, to provide data in this regard as well.

I believe that I can demonstrate similar losses, (involving one of the Petitioners) due to inadvertent oversight, to the State of approximately $1,000,000, that involved only a slap on the wrist.

This would make a mockery of the tone of Exhibits 3, 4, and 5.

9. In a slight digression, I would like point out that the Appellate Divisions' opinion contained a minor error in that the checks did not "sit on my desk".

II Appellants Questions Raised.

1.

" Review should be granted to determine whether allowing Illinois to be sued in the Courts of New Jersey over Illinois firing of a state tax auditor would interfere with Illinois ability to fulfill the "sovereign responsibilities" of the employment of state agents and the collection of taxes.."

Comment:

In Nevada v. Hall, 440 U.S. 410, (1979), it was held that a state is not constitutionally immune from suits in the courts of another state.

The Court in Hall pointed out that there could be instances where a state's sovereignty was so infringed upon as to require a different analysis by the Court.

I submit that the case at bar is not significantly different in substance from Hall. Petitioners have advanced the argument that this is just the case to require a conclusion different from Hall. I disagree.

I believe that there is very little substantive difference between the present case and the principles of Nevada v. Hall. Both cases concern an alleged wrong against an individual

In both cases, the alleged civil wrong was committed by agents of a state within the borders of a sister state.

Both of the alleged wrongs involved actions by state agents while working in their official everyday capacities.

Both of the Plaintiffs were allegedly injured in a way that could have been caused by a private entity.

Neither Plaintiff sought to alter the sovereign functioning of the sister state.

Presumably, both Nevada and Illinois continue to exercise their everyday business affairs without apparent detriment. They have not been greatly affected by these suits.

The legislatures of both California and New Jersey have spoken their will that individuals, within their borders, be protected against the specific wrongs complained of.

I submit that just as in Hall, the present case presents no threat to the sovereign responsibilities of Illinois. I am not seeking to alter the way in which Illinois conducts its affairs, other than to seek redress for a specific wrong.

The Court, in Hall, held that Nevada's sovereign responsibilities could hardly be affected by being amenable for a civil wrong in California.

The New Jersey Supreme Court in this case has held that Illinois was free to go about its sovereign activities in New Jersey so long as it did not violate New Jersey law.

There is no conflict of law that would require the Court to intervene at this time.

To my knowledge, no jurisdiction has disagreed with the principles held in Nevada v. Hall, 440 U.S. 410 (1979)

The principles of Alden v. Maine 527 U.S. 706 (1999) do not conflict with those of Nevada v. Hall, 440 U.S. 410 (1979).

That case dealt with a states' refusal to waive immunity within its own borders and whether Congress could abrogate that refusal. No such issue is at bar in this case. Illinois does waive immunity on a regular basis within its borders and suffers no apparent detriment .

In writing for the majority in Alden, Justice Kennedy indicated his support for the principles of Hall:

"..our decision in Hall does not support the argument used by petitioners here. The decision addressed neither Congress' power to subject States to private suits, nor the States' immunity in its own courts. In fact, the distinction drawn between a sovereign's immunity in its own courts, and its immunity in the courts of another sovereign, as well as the reasoning on which this decision was based are consistent with and even support the propositions urged by the respondents here- that the Constitution reserves to the States a constitutional immunity from suits in their own courts which cannot be abrogated by Congress."

I submit that Kimel v. Florida Board of Regents, __U.S.___(2000) does not conflict with Nevada v. Hall, indeed it seems to complement Hall.

Justice O'Connor pointed out in Kimel that state employees could still avail themselves of remedies against discrimination under state statutes. I am confident that Justice O'Connor did not intend that an entire class of "out of state" state employees have no remedy.

Petitioners maintain that their sovereignty would be infringed upon if they had to be held accountable for violations of New Jersey law committed within New Jersey.

Nevada v. Hall ruled that both states are co equal sovereigns.

New Jersey's sovereignty would be diminished if its laws did not need to be heeded by Petitioners.

Petitioners are attempting to mask their role as an employer in New Jersey with its sovereignty arguments.

The sovereignty of Illinois is no way diminished when it is answerable for such civil wrongs. Indeed, good relations between states or cooperative federalism, it seems to me, requires a state to obey the laws of a sister state while doing business within that state, just as it would have it within their own state.

The New Jersey Supreme Court, in the present case, went so far as to rule out re-instatement as to remove any possible interference with its tax collecting functiou in forcing Illinois to employ someone who they rightly or wrongly felt they did not wish to represent them.

This is an employment case. There are no weighty issues infringing on the sovereignty of Illinois.

I submit that the Appellate Court, 319 N.J. Super. 324, had it right in that I would be effectively without a remedy if Petitioners were to prevail.

The State of Illinois has insisted throughout that I file my suit under the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq.,

They have refused to acknowledge that I was not even covered by the HRA. The language of that Act clearly indicates that it is intended to protect the citizens of Illinois. It also clearly requires that to be considered an employee within the meaning of the HRA, one must be employed within Illinois for remuneration.

This was affirmed by the Appellate Court.

At the proceeding before the New Jersey Supreme Court, Petitioners presented a legal opinion from the General Counsel of the IDOR stating the opinion that I "could" have brought suit under the HRA.

This carefully worded opinion ignored all of the definitional requirements of the HRA. It refrained from opining that I should or must bring suit under the HRA.

The Supreme Court of New Jersey, agreed that I "could" have brought suit in Illinois under the HRA, but was time barred when I brought suit in New Jersey.

The finding that I "could", rather that "should", begs the question of whether a Court in Illinois would likely entertain my suit given the strict definitional requirements and stated purpose of the Illinois HRA.

It also begs the question of why I would file a suit in Illinois after reading the requirements and purposes of the HRA. Such a course of action for me would be patently unreasonable, not to mention extremely inconvenient.
The common sense meaning of the purpose and definitions of the HRA does not comport with the position taken by the Petitioners.

The Supreme Court of New Jersey did not go into a lengthy analysis of the HRA and its definitional requirements since they considered the issue moot.

However, I believe that an analysis of the terms "employee" as one employed for remuneration within Illinois, will show that "State employee" is clearly a subset of the term "employee" and is also intended to cover only those employed within Illinois for remuneration.

I raise this point because the finding referred to above, although moot, affords a patina of reasonableness to what is really a very unreasonable assertion by the State of Illinois.

It is clear from a reading of the HRA, that only "in-state" "State Employees" are intended to be covered. Given the clear requirement that one be employed within Illinois for remuneration and that the very purpose of the Act is to protect the citizens of the State of Illinois from discrimination within Illinois, it is clear that I was not covered.

The State legislature of Illinois was, or should have been aware, that it had "out of state employees". If it had intended to assume jurisdiction over these employees, it would have done so explicitly. It should have done so in the HRA and in policy statements to its "out of state" employees.

It is not surprising that Petitioners position regarding the HRA was not advanced generally before the present litigation. It is plain that it is merely an artifice for purposes of this case.

Thus, the State of Illinois, in attempting to deny me redress in New Jersey under the New Jersey Law Against Discrimination, N.J.S.A, 10:5-1 et seq.,would deny me any redress at all.

Based on the recent decision in Kimel v. Florida, __U.S.__, 120 s.Ct. 631 (2000), I could not file suit in the federal courts.

It would be unjust if a resident of New Jersey or any other state was to learn after the fact that he/she had no redress because they

were, by happenstance, injured in their home state by an agent of a sister state.

2. Review should be granted to permit the court to reexamine Nevada v. Hall in light of its recent recognition that sovereign immunity may be implied from the structure of the constitution.

Comment

I submit that since there is, to my knowledge, no conflict of law between any state jurisdiction and Nevada v. Hall, no intervention by the Court is necessary at this time.

The recent cases, alluded to by Petitioners, do not deal with co-equal sovereigns.

Kimel v.Florida, 120 S. Ct. 631(2000), deals with state versus federal law.

Alden v. Maine, 527 U.S. 706 (1999) deals with questions of state sovereignty within its own borders. This case held that Congress could not abrogate a refusal by Maine to waive its own sovereignty within its borders. Illinois does waive its sovereignty within Illinois. I am asking them to be amenable to suit within New Jersey as well. The Illinois Department of Revenue is able to function with no perceived detriment within Illinois by suits within Illinois.

Also, as mentioned above, Alden seems to comport with Hall in the opinion of Justice Kennedy for the majority in Alden.

Conclusion

For the reasons stated above, certiorari should not be granted.

Respectfully submitted,

Date: 6/30/2000

M J McDonnell

Michael J. McDonnell
Respondent, Pro Se

Certification

I certify that the statements made herein are true to the best of my knowledge.

I am aware of the penalties for making false statements to the Court.
I also certify that I served the Counsel of Record, via certified mail, three copies of this brief on or about the date indicated below.

Date: 6/20/2000

M. J. McDonnell

Michael J McDonnell
Respondent, Pro Se

APPENDIX

Exhibit 1.
M. McDonnell memo to Juan Morales, dtd. 7/7/93

ILLINOIS DEPARTMENT OF REVENUE

Century Plaza
15 Essex Rd.
Paramus, N.J., 07652

MEMORANDUM

To: Juan Morales FAM
From: Michael J. McDonnell RA1

Date: 7/7/93

Subject: Delay in Posting Checks
On May 24, 1993 the attached package of mail was received in this office. It was opened and placed in my mailbox. The cover letter alludes to checks included. I did not notice this however.

The items sent were sent to me as a result of my written request. (See attached letter dated 3/12/93.) I did not request checks be sent.

When the material was received, I had no reason to expect checks as I had not even finalized the audit.
The taxpayer figured interest up until 5/17. And included this in the checks.

I looked over the material and not seeing that checks were attached to the interior of the package, I put the package in the audit file.

I noticed that there were checks two days ago, when I worked on the audit file in the office.

The checks total $48,931. They were drawn of (sic) 5/17/93 and received in this office on 5/24/93.

Exhibit 2- Audit Log of Activities Relating to the Case in Question

HISTORY WORKSHEET Telephone No: 203-275-5859

Name: Phoenix Mutual
Address: 1 American Row
Address: Hartford, Ct.. 06115

Fein: 06-0493340

Date: Comments

7/13/92 - Went to taxpayers. Met with Mr. Pease. He informed me that Phoenix Mutual was in litigation regarding Federal Taxable Income. He informed me that income as reported for Illinois purposes was the company's best estimate of the income of the tax court litigation. The taxpayer has been filing Illinois returns on a timely basis based on their filed federal return. I was informed that the years 1975-through present are in litigation. 1980 was settled and an amended IL-1120X was filed.

5/20/93- Spoke with Glen Pease. He promised to send me for the following years:
1. Federal Returns
2. Original federal and Illinois returns.
3. Copies of Federal Court settlement spelling out FTI.
4. Check covering estimated liability.
The years that have been cleared up are 1975-79, and 1981.
1980 was settled and amended previously
(EDC-5)
5/20/93- 1982 forward remain under litigation.
5/26/93- Received summary letter and checks from taxpayer.
7/8/93- Completed write-up and submitted audit.

Exhibit-3 Memo From Brian McGrail to Juan Morales, dated 7/8/93.

ILLINOIS DEPARTMENT OF REVENUE
Century Plaza
15 Essex Road
Paramus, N.J. 07652

MEMORANDA(sic)

TO: Juan Morales FAM
FROM: Brian McGrail RAS

DATE: July 8, 1993

SUBJECT: Summary of Activities Regarding Mike McDonnell and Phoenix Home Life RAR's.

At approximately 11:00 am on 7/7/93 Paula informed me that she had just received five checks from Mike McDonnell. The checks were from Phoenix Home Life totaling approximately $48,900 and they were all dated 5/17.93.

When I questioned Mike, he indicated that he had picked up the IL-1120x's and correspondence from his mailbox and that he had not seen the checks. Because they were stapled to the IL-1120x's.

When I informed you of the problem concerning this audit, you had Mike write a memo indicating the facts concerning these checks.

In the early afternoon Mike, you and I met to discuss this incident. Mike claimed he did not expect to receive any checks or IL-1120x's. Mike further stated that he reviewed the correspondence albeit "not thoroughly" and therefore he did not see the checks.

Exhibit 3 (Continued)

Later this afternoon I spoke with the taxpayer, Mr. Glen Pease, about this, and he informed me that the RAR's were finalized in January 1993 and since the RAR's were appealed, it was just easier to file the returns themselves. Mr. Pease also indicated that Mike told him to send it all to him and he would wrap it up in his audit. Mr. Pease mentioned that Mike was not there very much.

Further investigation into Mike's EDC-5 (audit history worksheet) revealed that on 5/20/93 a statement indicated that Mike was expecting the checks. Moreover, on 5/26/93, Mike's EDC-5 states he received a summary letter and checks from the taxpayer.. This is in clear contradiction to the letter Mike gave you this morning and statements he made in our meeting this afternoon.

Please advise me as to the course of action regarding this audit and what disciplinary action should be taken.

Exhibit 4, Memo from Juan Morales to Joe Bartletti, dtd. July 8, 1993

ILLINOIS DEPARTMENT OF REVENUE
Century Plaza
15 Essex Rd.- 4th Floor
Paramus, N.J. 07652

MEMORANDUM

To: Joe Bartletti

From: Juan C. Morales

Date: July 8, 1993

Subject: Mike McDonnell

I am hereby requesting that auditor Mike McDonnell's employment with the Illinois Department of Revenue be terminated immediately.

Attached is Brian McGrail's memo regarding Mike McDonnell's latest incident. As you can see, it involves another incident where Mike has failed to follow up on his duties and responsibilities.

Enclosed are copies of the taxpayer's letter, the checks received, Mike's memo to me, the audit EDC-5, and various other documents relating to the Phoenix Mutual audit.

As you know, we have done everything possible to refrain from firing Mike McDonnell. However, we can no longer tolerate his lack of responsibility and unprofessional behavior. Especially, when his latest explanation and excuse totally contradicts the facts of the case.

Exhibit 4 (Continued)

If you have any questions and/or need any further information, please let me know. If necessary we can make copies of his entire regional personnel.

I would appreciate, for everyone's sake, that the request be granted as soon as possible.

Cc: Brian McGrail

Exhibit 5- Memo From Joe Bartletti to Mike Scaduto, Manager Bureau of Audit, dated July 14, 1993.

ILLINOIS DEPARTMENT OF REVENUE
Field Operations Division
101 West Jefferson Street
Springfield, Illinois 62794

MEMORANDUM

To: Mike Scaduto, Manager
Bureau of Audit

From: Joe Bartletti
Field Operations Division

Date: July 14, 1993

Subject: Mike McDonnell

Attached find a recommendation from FAM Juan Morales to terminate Revenue Auditor II Mike McDonnell. The latest episode involving Mr. McDonnell involves him maintaining five checks totaling $48,900 in his possession from May 24 to July 7. Furthermore, when questioned on July 7 about the incident, Mr. McDonnell denied he knew he had the checks. A later review of the audit file contradicted what he told management that day.

Mr. McDonnell's actions clearly violate D.O.R. and Audit Bureau policies. Based on his work record reflecting prior problems, I concur with Juan's recommendation to dismiss Mike McDonnell as soon as possible.

JB: rc

(Handwritten notes " Concur /Mike Scaduto 7/19/93" "Concur/ (name somewhat illegible, appears to be "David Bartholo" 7/29/93).